HERMAN HAAKANSON

IBLA 76-28 Decided December 4, 1975

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application AA 7353.

Affirmed.

1. Alaska: Native Allotments

   Substantial use and occupancy, as contemplated by the Native Allotment Act, must be by the Native independently for himself or as head of a family prior to the effective date of withdrawal, and he may not tack on use and occupancy by his parents or ancestors to establish a right for himself prior to the withdrawal.

2. Alaska: Native Allotments--Alaska: Indian and Native Affairs--Indian Allotments on Public Domain: Lands Subject to--Alaska: Grazing--Alaska: Statehood Act

   Withdrawal of land in 1940, inclusion of the land in a grazing lease under authority of the Alaska Grazing Act of March 4, 1927, revocation of the withdrawal in 1961, and selection of the land by the State of Alaska under authority of the Statehood Act in 1963 while the grazing lease was still extant, effectively kept the land closed to the initiation of rights under the Native Allotment Act at all times during the period from 1940 to the revocation of the Allotment Act on December 18, 1971, by section 18 of the Alaska Native Claims Settlement Act.

3. Rules of Practice: Hearings

An evidentiary hearing will be denied where there are no facts in dispute and only legal issues are involved.

APPEARANCES: Matthew D. Jamin, Esq., Alaska Legal Services Corporation, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Herman Haakanson has appealed from decision of May 30, 1975, by the Alaska State Office, Bureau of Land Management, rejecting his Native allotment application filed pursuant to the Alaska Native Allotment Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970), 1/ because the land has been continuously withdrawn or otherwise segregated from appropriation since before the time appellant allegedly began his occupancy.

The decision pointed out, and correctly so, that the regulations governing the 1906 Act relate only to vacant, unappropriated and unreserved public lands in Alaska. 43 CFR 2561.0-3. If a Native has completed the 5-year statutory period of substantial use and occupancy prior to the effective date of withdrawal or segregation, the allotment may be granted under appropriate circumstances even though the land is still segregated at the time of application. However, where a Native has not completed the statutory period of use and occupancy prior to the effective date of withdrawal or segregation, the allotment application must be rejected. Susie Ondola, 17 IBLA 359 (1974).

The land was not available for appropriation in 1944 when appellant alleged that his occupancy began, as it was embraced in Executive Order No. 8344 of February 12, 1940, which withdrew all of Kodiak Island from settlement, location, sale or entry and reserved it for classification in aid of legislation. The withdrawal was revoked on June 26, 1961, by P.L.O. No. 2417. 2/ On

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1/ The Alaska Native Allotment Act was repealed by section 18 of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. § 1617 (Supp. III, 1973).

2/ P.L.O. 2417 specified that: "Of the areas released from withdrawal * * * considerable areas are under grazing lease as authorized by the act of March 4, 1927 (44 Stat. 1452; 48 U.S.C. 471, 471a-471o). Lands included in such leases are considered to be appropriated and segregated and unavailable for entry under the * * * public land laws relating to vacant, unappropriated lands, unless and until they have been determined to be suitable for such purposes and appropriate action has been taken to cancel the lease to the extent necessary and to classify the lands for other use or disposal."

January 1, 1957, while the withdrawal was still extant, grazing lease A-037819 was issued to Kizhuyak Bay Cattle Co., under authority of the Alaska Grazing Act of March 4, 1927, 43 U.S.C. §§ 316-316o (1970). 3/ The lease further segregated the land, the segregative effect continuing after Executive Order No. 8344 was revoked, under authority of the regulations governing the 1927 Act. 43 CFR 4131.3-1. 4/ Appellant alleged that the grazing lease was terminated on June 20, 1966. Even so, it is immaterial because on October 29, 1963, the State of Alaska had amended its State selection application A-056420 to include the subject land. The State selection application segregated the land from the date it was filed. 43 CFR 2627.4(b).

Appellant contends, and argues extensively, that Executive Order No. 8344 was made subject to valid existing rights, and that he can tack on the occupancy and use of the land by his ancestors prior to the date of the withdrawal.

[1] According to the decision below the appellant was born in 1930 and was, therefore, only 10 years old when the land was withdrawn in 1940. This Board has repeatedly and consistently held that the substantial use and occupancy, as contemplated by the Alaska Native Allotment Act, must be by the Native independently for himself or as the head of a family, and not as a minor child occupying or using the land in company with his parents or ancestors. Therefore, appellant may not tack on the alleged ancestral use occurring prior to the commencement of his occupancy in 1944 at a time when the land was under withdrawal. Emma Moses, 21 IBLA 264 (1975); Lula J. Young, 21 IBLA 207 (1975); Warner Bergman, 21 IBLA 173 (1975); Ann McNoise, 20 IBLA 169 (1975); Louis P. Simpson, 20 IBLA 387 (1975); Arthur C. Nelson (On Reconsideration), 15 IBLA 76 (1974); Larry W. Dirks, Sr., 14 IBLA 401 (1974).

Appellant next argues that, even if tacking of his ancestors' use of the land is not permitted, he established his exclusive use and occupancy of the land on June 26, 1961, when the withdrawal was

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3/ Now codified as 43 U.S.C. §§ 316a-316o (1970). Executive Order No. 8344 did not prohibit the issuance of grazing leases and other use permits within the withdrawn area.

4/ 43 CFR 4131.3-1 reads: "Lands leased under the Act are not subject to settlement, location, and acquisition under the nonmineral public land laws applicable to Alaska unless and until the authorized officer of the Bureau of Land Management determines that the grazing lease should be canceled or reduced * * *." At the time the lease was issued the regulation was codified as 43 CFR 63.18, Circular 1929, 20 F.R. 6703 (September 13, 1955), and although it was worded differently, it was to the same effect as the current regulation.

revoked by Public Land Order 2417; that neither the grazing lease issued in 1957 nor the subsequent state selection precludes the establishment of his occupancy in 1961 because it was subject to his prior settlement and occupancy; and that the fiduciary responsibility of the Department precluded the grant of a grazing lease on land used and occupied by an Alaska native, citing Cramer v. United States, 261 U.S. 219, 227-29 (1923), and other cases.

[2] Appellant overlooks the fact that his claim is a nullity because it was commenced at a time when the land was withdrawn from settlement and acquisition by Executive Order No. 8344. Thus, when the withdrawal was revoked in 1961 the land was still segregated under the principle laid down in Harold J. Naughton, 3 IBLA 237, 78 I.D. 300 (1971), and Helena M. Schwiete, 14 IBLA 305 (1974). Native occupancy commenced at a time when the land is not subject thereto gives rise to no rights. Cf. Donald E. Miller, 2 IBLA 309 (1971). Nor can occupancy in those circumstances, constituting a trespass, preclude other disposition of the land. Helena M. Schwiete, supra. Withdrawal of the subject land in 1940, inclusion of the land in the grazing lease in 1957, and selection of the land by the State of Alaska in 1963, have effectively kept the land closed to the initiation of rights under the Native Allotment Act at all times during the period from 1940 to December 18, 1971, when the Allotment Act was repealed by section 18 of the Alaska Native Claims Settlement Act, supra. See Arthur C. Nelson, supra.

As for the allegation concerning fiduciary responsibility, this Board said in Helena M. Schwiete, supra at 308:

> Appellant asserts that the Department stead-fastly has adhered to the principle of protecting Indian occupancy on public lands, citing, inter alia, Cramer v. United States, 261 U.S. 219, 227-29 (1923) and Solicitor's Opinion, 56 I.D. 395, 397-98 (1938). We agree. The Department also has the responsibility of protecting rights of others to public land tenure, including persons who have been granted grazing leases under the Alaskan Grazing Act of March 4, 1927, as amended, 43 U.S.C. § 316, 316a-o (1970). * * *

Lastly, appellant contends that even if he could not establish a preference right on June 26, 1961, his right attached on December 26, 1961, since the State failed to make its selection until 1963, nearly 2 years after the 6-month preference right period afforded it by Public Land Order 2417.

As pointed out above, the subject land was segregated from allotment at all times after February 12, 1940, so that appellant could not establish a preference right to an allotment of the land either on June 26, 1961, or on December 26, 1961. While P.L.O. 2417 provided a preferential period to the State of Alaska to select these lands, inter alia, the right of the State to select did not expire through its failure to submit an application during the preference period. When the State's application was filed on October 29, 1963, and posted to the BLM status records, the lands became segregated from further appropriation based upon application or settlement and location. 43 CFR 2627.4(b). However, further action on the State selection application could not be taken until the existing grazing lease had been canceled or reduced, as provided by 43 CFR 4131.3-1.

[3] Appellant demands a hearing, citing in support thereof, Goldberg v. Kelly, 397 U.S. 254 (1970), and McDonald v. Lucas, 371 F. Supp. 831 (D.C. S.D. NY 1974), aff'd, 95 S.Ct. 297 (1974). The Department has consistently held that where there are no facts in dispute and the sole question is a legal issue, an evidentiary hearing is not necessary. Ann McNoise, supra, and cases cited therein. The request is, therefore, denied.

Accordingly, we find that appellant's application was rejected properly.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is hereby affirmed.

Anne Poindexter Lewis
Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge

I concur in the result:

Joseph W. Goss
Administrative Judge